STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

EX PARTE OR LATE FILED

March 27, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036



Re: PR Docket No. 94-105



Dear Mr. Caton:

Please find enclosed ten copies each of two orders issued by the California Public Utilities Commission ("CPUC") at its conference of March 22, 1995 which are relevant to the above-referenced proceeding. The first order discusses the further steps that the CPUC is taking in implementing its cellular rate unbundling program in order to introduce effective competition into currently non-competitive cellular markets in California. The second order denies the petitions for rehearing of CPUC D.94-08-022, the order in which the CPUC adopted the cellular rate unbundling program as necessary to stimulate competition in the cellular industry in California.

Please include these official publicly-available documents of the CPUC as part of the public record in this proceeding. A copy of this letter has been served on all parties to this proceeding.

Sincerely,

Ellen S. LeVine
Counsel for CPUC

ESL:nas

Enclosures

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 27th day of March, 1995 a true and correct copy of a letter dated March 27, 1995 to William F. Caton describing two recently issued orders of the California Public Utilities Commission was mailed first class, postage prepaid to all known parties.

Ellen S. LeVine

/nas

L/bjk



MAIL DATE
3/24/95

Decision 95-03-043 March 22, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications. | ) ) ) ) | I.93-12-007 (Filed December 17, 1993) |



**ORDER MODIFYING DECISION 94-08-022 AND DENYING REHEARING**

Applications for rehearing of Decision (D.) D.94-08-022, an interim opinion in Investigation (I.) 93-12-007 (the Mobile Telephone and Wireless investigation), were filed by McCaw Cellular Communications, Inc. (McCaw), Airtouch Cellular (Airtouch) and its affiliates, Los Angeles SMSA Limited Partnership, Sacramento-Valley Limited Partnership, MODOC RSA Limited Partnership, Bay Area Cellular Telephone Company (BACT), Cellular Carriers Association of California (CCAC), GTE Mobilnet of California L.P. which was joined in its application by GTE Mobilnet of Santa Barbara L.P., Fresno MSA L.P., Contel Cellular of California, Inc., and California RSA No. 4 L.P. (GTE et al.), U.S. West Cellular of California (U.S. West) and Los Angeles Cellular Telephone Company (LACT). All applicants except U.S. West requested that D.94-08-022 be stayed pending our determination of rehearing requests. In the interest of efficiency, the various applicants, which in all cases represent the interests of facilities-based cellular telephone carriers, will be referred to herein collectively as applicants or carriers.

In D.94-08-022, we have exercised our quasi-legislative authority to investigate and adopt rules applicable to the wireless industry. The Decision adopts wholesale cellular rate unbundling as part of our overall policy of enhancing competition in the commercial mobile radio service market, establishes

standards for extended area service (EAS) wholesale roamer rates, and determines that state jurisdiction over cellular carriers should continue for 18 months beginning September 1, 1994.

The Federal Communications Act of 1934 (Communications Act), 47 U.S.C. §§ 151, et. seq., as amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act), Public Law 103-66, § 6002 permits states to file petitions with the Federal Communications Commission (FCC) if they wish to continue, after August 10, 1994, exercising jurisidiction over rates charged by cellular carriers. Pursuant to D.94-08-022, we elected to file such a Petition with the FCC, seeking jurisdiction for an additional 18 months beginning September 1, 1994.[1]

Since filing applications for rehearing of D.94-08-022, several carriers have formally opposed our FCC Petition seeking extended jurisdiction and we have replied.[2] In such oppositions, carriers reiterate many of the allegations of error identified in the instant rehearing applications. The following is a summary of the more significant allegations that applicants claim are demonstrative of the legal or factual errors which render D.94-08-022 improper or invalid. Applicants claim that D.94-08-022: is preempted by or conflicts with federal law; is ambiguous in various respects; and is invalid because parties

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1. The Commission filed the Petition on August 8, 1994, (See "Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates," PR Docket No. 94-105). Although the Petition was not served on all parties to the instant proceeding, it was served on the following applicants for rehearing of D.94-08-022 and/or their legal representatives: Airtouch, McCaw, CCAC, BACT, U.S. West.

2. Our reply to such opposition was filed with the FCC and served on rehearing applicants, BACT, U.S. West, McCaw, Airtouch and CCAC (see Reply By California To Oppositions To CPUC Petition To Retain Regulatory Authority Over Intrastate Cellular Service Rates dated October 18, 1994).

were denied their right to due process. In addition, carriers allege that D.94-08-022 violates statutory requirements of the Public Utilities Code by reaching conclusions on matters outside the record, by failing to base findings and conclusions on the record, by changing previous Commission decisions and by reaching conclusions significant to the wireless industry without first having afforded parties an opportunity to be heard.

Responses to the applications for rehearing were timely filed by Nextel Communications, Inc. (Nextel), MCI Telecommunications Corporation (MCI), Utility Consumers Action Network (UCAN) joined by Toward Utility Rate Normalization (TURN) and Cellular Resellers Association (CRA), joined by Cellular Service Inc. (CSI), Comtech Mobile Telephone Co. (Comtech) and Nationwide Cellular Service Inc. (NCS). Respondents support D.94-08-022, especially the requirement of wholesale cellular rate unbundling which carriers strongly oppose. Several parties filed oppositions to carriers' requests that D.94-08-022 be stayed pending rehearing determination. In addition, CRA filed a petition to modify the Decision by extending the Commission's jurisdiction to act in the public interest with respect to the cellular industry beyond the designated 18 months. DRA and Nextel filed responses in support of CRA's petition while CCAC and LACT formally opposed the petition.

In D.94-11-029, we denied the requests for stay and the petition to modify D.94-08-022. We also directed the assigned Administrative Law Judge (ALJ) to take appropriate steps to solicit, for our consideration, the input of the parties regarding implementation measures to facilitate the unbundling process ordered in D.94-08-022.[3]

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3. Pursuant to D.94-11-029, we expect that comments solicited by the ALJ regarding implementation of rate unbundling will assist us in providing further direction, as necessary, on this issue.

The instant decision resolves the applications for rehearing. We have carefully considered those applications and the responses thereto. Although we do not discuss each of the numerous allegations which applicants assert justify rehearing, all bona fide allegations[4] have been considered. Herein we decide that applicants' allegations of error, whether or not discussed, do not show good cause for rehearing. While we conclude that rehearing is not warranted, we do recognize certain errors or ambiguities in the Decision which require correction or clarifying modification. Therefore, our order today modifies D.94-08-022 consistent with our discussion below.

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4. A bona fide rehearing allegation is one that comports with the requirements of Rule 86.1 of the Commission's Rules of Practice and Procedure. That rule provides:

> "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commisssion to an error, so that error may be corrected expeditiously by the Commission." (Rules of Practice and Procedure [August 3, 1994], Rule 86.1).

In this decision, we will not consider substantial portions of the instant applications which are mere reargument of positions asserted in carriers' comments filed in this proceeding and/or in carriers' opposition to the Commission's FCC Petition. In addition, lack of specificity of an allegation (e.g., "D.94-08-022 violates applicable provisions of the Public Utilities Code."), as Rule 86.1 indicates, invalidates it. Such allegations in the instant rehearing applications have not been considered.

Carriers' Allegations That D.94-08-022's Requirements Are Preempted By Federal Law

In their applications, carriers again assert the position that during the pendency of the FCC Petition described above, the Communications Act, as amended, confines the Commission's authority to rate regulation which was in effect June 1, 1993. Therefore, applicants argue, the Commission lacks authority to enforce D.94-08-022's orders which affect EAS wholesale roamer rates or that require cellular carriers to unbundle services and rates and interconnect to a reseller switch. We do not agree. The carriers' interpretation that Congress requires or intends to impose a June 1, 1993 paralysis on our ability to act in the public interest with respect to this industry is inaccurate. Several cellular carriers previously asserted this claim of federal preemption in comments filed in this proceeding. In D.94-08-022, and later, in documents filed with the FCC and served on several of the rehearing applicants, we noted carriers' faulty interpretation of federal law and explained our conclusion that we are not preempted from requiring rate unbundling and interconnection of the reseller switch. We have reviewed our reasoning as expressed in D.94-08-022 and find it to be sound.[5]

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5. In D.94-08-022, we stated:

> "Contrary to the view of the cellular carriers, we do not interpret Section 332 of the Communications Act as prohibiting any modifications in specific state regulatory rules and procedures until the FCC acts on the CPUC petition to retain jurisdiction over mobile service carriers, which must occur by August 10, 1995. As stated in the FCC Second Order and Report (Sec. III F.2), it is the

(Footnote continues on next page)

In a further federal preemption claim, carriers argue that although the federal government has exclusive jurisdiction over interstate communications, D.94-08-022's authorization of interconnection of a reseller switch erroneously fails to limit related activities to intrastate calls. This seems a peculiar concern. It is well-established under federal law that states set intrastate rate elements of network services, features and functions used in both interstate and intrastate communications. California v. FCC (9th Cir. 1990) 905 F.2d 1217; California v. FCC (9th Cir.1993) 4 F.3d 1505; Louisiana Pub. Serv. Comm'n v. FCC (1986) 476 U.S. 355. In D.94-08-022, we have ordered the unbundling and setting of rates for components of access service provided by the duopoly carrier wireless network, a function which in other contexts has long been subject to dual state and federal authority. Louisiana Pub. Serv. Comm'n v. FCC, supra (1986) 476 U.S. 355.

The scope of D.94-08-022's rate unbundling/reseller switch plan is far more limited than carriers infer. It seems unlikely that the failure to note the geographic boundaries of our authority will produce confusion, or that the reseller switch

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(Footnote continued from previous page)

> authority to regulate, not the specific rules in effect at some point in time which is subject to extension pending a ruling on the petition." (D.94-08-022, page 82.)

A more detailed legal analysis of why carriers' federal preemption claim is a faulty interpretation of the federal act is contained in the documents which we filed with the FCC (see the Petition and Reply cited supra, in footnotes 1 and 2).

interconnection authorized in D.94-08-022 will invade interstate arenas. Accordingly, we conclude that carriers' allegation of error based on federal preemption of interstate communication is without merit.

Finally, while reviewing the Decision in connection with the Communications Act, we identified statements and requirements in D.94-08-022 which may raise appropriate questions of federal preemption. The Communications Act, as amended, preempts states from regulating entry of all commercial and private mobile radio service telecommunications companies, including those providing intrastate service within the State of California (see the Budget Act, Public Law 103-66, section 6002 which amends sections 3 (n) and 332 of the Communications Act.). In light of this provision, we believe that references in D.94-08-022 to revisions of existing certificates of public convenience and necessity (CPCN) may be ambiguous. We shall further study the application of the amended Communications Act to these references in the Decision and should we determine that no conflict exists, we shall announce appropriate requirements in a later decision. Until then, it is reasonable and appropriately cautious to remove all ambiguous references from D.94-08-022. Accordingly, as ordered herein: we shall revise Ordering Paragraph 1 to exclude the requirement associated with resellers' CPCNs;[6] we shall delete the last paragraph on page 83 including

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6. No application for rehearing raised this particular question of federal preemption. However, our concern about this possible conflict was underscored by the March 7, 1995 Petition To Modify D.94-08-022, filed by CRA. CRA's petition asserts that D.94-08-022's order that switched resellers "amend" their CPCN is improper because the authority to issue such an order is reserved to the federal government. In view of our decision to delete CPCN references from D.94-08-022, the Petition To Modify filed by CRA is hereby rendered moot.

the quotation from D.92-10-026 which ends on page 84; and, we shall delete the following statement from the Decision:

> "For the sake of clarity, however, we amend all CPCNs for cellular carriers to include a blanket authorization permitting EAS service anywhere within California." (D.94-08-022, page 87.)

Since the issuance of D.94-08-022, we have established an information procedure by which commercial mobile radio service (CMRS) providers who intend to offer intrastate wireless telecommunications services within California but did not hold a CPCN for such services prior to August 10, 1994, shall file a Wireless Identification Registration (See D.94-10-031.). As with new CMRS providers, the Commission will need certain updated registration information from cellular resellers which intend to become switch-based resellers. Therefore, in place of the amended CPCN requirement which we are eliminating from D.94-08-022, resellers will be required to file an advice letter indicating it is a switch-based reseller and to serve a copy of said advice letter on the interested carrier.

Carriers' Allegations Of Due Process Violations

Carriers assert numerous errors on the ground that their due process rights were not adequately protected by the written comment procedure used to develop the record for D.94-08-022. They claim that evidentiary hearings were necessary. For example, applicants allege that they were deprived of their due

process right to notice[7] and an opportunity to be heard on matters of fundamental importance such as D.94-08-022's dominant/non-dominant framework and market share analysis, that they had no opportunity to respond to non-public or "secret" data upon which the Commission relied in reaching its decision and that, despite the statutory mandate of Section 1708 of the Public Utilities Code[8] and the requests of parties, no hearing was provided on issues which had been decided in previous Commission decisions but which are changed by D.94-08-022.

Carriers' Allegation That Due Process Requires Evidentiary Hearings

Before addressing the Section 1708 claim of error, we turn our attention to the question of whether due process requires evidentiary hearings in a quasi-legislative proceeding where we are establishing the rules and standards to be applied to an entire industry or class of utility. For the reasons stated below, we conclude that evidentiary hearings were not necessary or required for resolution of the matters in D.94-08-022.

The Commission conducts many types of proceedings without evidentiary hearings. Often our investigations, as in this case, appropriately are characterized as legislative in nature and in such instances, the California Supreme Court has held that evidentiary hearings are not required. In Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292, petitioners

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7. As to the lack of notice allegation, we find it to be without merit. Parties were given proper and adequate notice of the matters decided in D.94-08-022 by our Order Instituting Investigation, I.93-12-007, which established this proceeding and by ALJ rulings soliciting data and comments of the parties to develop the record upon which we have based the instant Decision.

8. Unless otherwise specified, all future references to code sections will be references to the Public Utilities Code.

claimed that tariff regulations adopted through the advice letter process violated their constitutional rights of due process because evidentiary hearings were not conducted before the proceeding was concluded. In deciding that the Commission had acted properly and that petitioners' rights had not been violated, the Court opined:

> "Although in the past the commission has authorized the adoption of similar credit rules following public hearings (citation omitted), the rules here challenged were adopted pursuant to advice letters that set forth the justifications for the rules and that were approved without hearings by resolutions of the commission. The adoption of the rules this way did not violate due process and was authorized by the statutes and regulations governing the commission's procedures."
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> "In adopting rules governing service and fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected ratepayers." (Id. at 292, emphasis added).

In D.94-08-022, we properly exercised our quasi-legislative authority; no vested interests were adjudicated. To be sure, as applicants suggest, important issues were before us. En route to D.94-08-022, all parties were afforded a fair opportunity to express their positions and provide data to assist us in reaching what we believe are salutary resolutions, in the public interest, of those important issues. Applicants' allegation of error based on the absence of evidentiary hearings is without merit.

Carriers' Allegations That D.94-08-022 Violates Section 1708's Evidentiary Hearings Requirement

Applicants' allegations that D.94-08-022 violates Section 1708 also are based on the fact that no evidentiary hearings were conducted in this proceeding. Applicants claim that Section 1708's evidentiary hearing requirement is applicable because D.94-08-022 changes, even reverses, the findings and conclusions of previous Commission decisions. For example, applicants note that D.94-08-022's conclusions regarding the lack of competition in the wholesale and retail cellular industry and determinations that carriers' earnings are excessive are significantly different from conclusions on these same issues reached in D.90-06-025, 36 CPUC 2d 464[9], as modified by D.90-10-047, 38 CPUC 2d 39 (text of decision not printed), the Commission's Phase I and II wireless decision in I.88-11-040. As explained below, applicants' assertions that Section 1708 is applicable to D.94-08-022 are misplaced.

Section 1708 provides:

> "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding,

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9. Carriers point to conclusion of law 20 in the Commission's 1990 wireless decision as illustrative of one of the changes made to that decision by D.94-08-022. Conclusion of law 20 of D.90-06-025, 36 CPUC 2d 464, 515 states:

> "20. The record does not substantiate that cellular carriers are earning an excessive return on their investment. A monitoring program to track the utilization of the spectrum by facilities-based cellular carriers should be established."
> (Conclusion of Law 20, 36 CPUC 464, 515; D.90-06-025)

> altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

It is true that Section 1708, when applicable, requires the Commission to hold a formal hearing when a party requests one. In California Trucking Assn. v. Public Utilities Comm., (1977) 19 Cal. 3d 240 (CTA), the California Supreme Court held that in the case before it, a quasi-legislative, minimum rate proceeding, the Commission was required under Section 1708 to conduct evidentiary hearings. In CTA, the court deemed the written comment procedure utilized by the Commission to be insufficient. The Court stated:

> "[S]ection 1708 provides that when the commission alters or rescinds a prior order the opportunity to heard must be afforded 'as provided in the case of complaints.' The procedure applicable to hearings on complaints filed by the commission on its own motion, as occurred here, is prescribed in sections 1701-1706. Section 1705 requires a hearing at which parties are entitled to be heard and to introduce evidence, and the commission must issue process to enforce the attendance of witnesses." (Id. at 244-45)

As indicated by the above quote, CTA does not, as one carrier suggests, stand for the proposition that in all instances, "the opportunity to be heard" means evidentiary hearings. CTA does not purport to interpret any hearing requirement other than that mandated by Section 1708. Moreover, Section 1708 mandates evidentiary hearings only when there is an alteration or rescission of a previous Commission decision or order.

Section 1708 does not apply to the instant Decision because D.94-08-022 does not alter a previous Commission decision. For example, although D.94-08-022 differs in several respects from D.90-06-025, 36 CPUC 2d 464, (as modified by D.90-10-047, 38 CPUC 2d 39), hereinafter referred to as D.90-06-025,

contrary to applicants' claims, D.94-08-022 neither changes nor reverses that 1990 decision. D.90-06-025 and D.94-08-022 were decided in the context of different regulatory schemes. Intervening Commission decisions altered some of our 1990 conclusions and substantively changed the regulatory framework for this industry.[10] By the time we decided D.94-08-022, the regulatory framework was so different from that of 1990 that the decisions developed in those disparate environments cannot be compared.[11]

One of the most significant changes in the regulatory framework of the wireless industry after 1990 occurred on April 23, 1993 when we issued D.93-04-058, which introduced rate band guidelines, and allowed carriers considerable rate flexibility.[12] Pursuant to D.93-04-058, a carrier's action to reduce rates could be effected immediately. Similarly, a carrier could raise rates to previous levels on one day's notice. No evidentiary hearings were conducted in D.93-04-058; the record underlying that decision was developed through a comment procedure similar to the one utilized in D.94-08-022. Despite the fact that D.93-04-058 clearly signaled that our view of the

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**10.** In the period between the Commission's issuance of D.90-06-025 and D.94-08-022, the Commission issued D.92-10-026, 46 CPUC 2d 1, as modified by D.93-05-069, D.93-04-058 and D.94-04-043.

**11.** This is the proverbial case of apples and oranges. Both are fruit but just as the properties of one cannot be used to describe the other, the properties of one cannot reasonably be superimposed upon or used to change the other. The same analysis is applicable to the 1990 and 1994 wireless decisions.

**12.** A year later, in D.94-04-043, we further relaxed and simplified the rate regulatory requirements for carriers by removing the 10% maximum reduction for temporary tariffs, by allowing greater flexibility with respect to the initiation and removal of provisional tariffs, and by permitting automatically renewable contract services.

industry had changed from that expressed in D.90-06-025, there were no Section 1708 challenges to D.93-04-058.

By 1993, we recognized that the expectations and conclusions underlying the analysis of D.90-06-025 had not been validated. Our comments in D.93-04-058 are instructive:

> "Cellular subscribers in California suffer the dubious distinction of paying among the highest rates in the nation. This situation is intolerable and must be changed. Over time our predecessors have suggested that a lack of competition born of the federally mandated duopoly nature of the industry has caused wholesale cellular rates to defy the forces of meaningful competition and remain high." (D.93-04-058, page 1)

After liberally quoting from D.90-06-025, in D.93-04-058, we explained the 1990 wireless decision, discussed its premises and commented on the validity of its forecast:

> "The majority [in D.90-06-025] elected to provide the industry with the opportunity to demonstrate that genuine competition existed between the duopolists. Specifically, it rejected regulation of the industry in favor of steps which would 'enhance competition.' (Citation and footnote omitted.) The majority's expectation was that if competition were to emerge to discipline the duopolists the evidence would be furnished by falling rates. To that end the majority adopted what it termed a scheme of pricing flexibility to ensure that the Commission's regulatory process would not stand between duopolists bent on lowering prices and a consuming public too long in need of such relief." (Footnote omitted.) (Id. at page 3.)
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> [Quotation from D.90-06-025 omitted.]
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> "Three years later virtually none of the Commission's expectations [of reducing cellular prices] have been met by industry performance. While many urge that the fatal flaw is the expectation that duopolists will engage in meaningful competition, the industry has a different explanation as to

> why basic cellular rates in all segments of the California market have remained at their historic high levels. It is all the Commission's fault!...Because of a fear that once a price was lowered, the Commission would obstruct a movement back to the old level." (Id., page 4.)

In D.94-08-022, we discussed the Commission's rate band guideline response to the above noted claim that "it is all the Commission's fault":

> "Accordingly, we put this claim to the test by adopting rate band price guidelines in D.93-04-058 which gave carriers that lower their prices the flexibility to raise rates to previous levels on one day's notice without any required showing. Existing rate levels were to serve as a cap absent a justification for increases. With this added rate flexibility in place, we observed that it would quickly be known whether cellular duopolists would, in fact, lower their rates. Our review in this Investigation fails to show that carriers have in fact significantly lowered rates for customers as a whole in response to the Rate Band Guidelines." (D.94-08-022, page 46)

Does D.94-08-022 rescind, alter, or amend any prior order or decision; and in particular, does it change D.90-06-025? We think not. In D.94-08-022, we evaluated the level of carriers' earnings, the need for enhanced competition and the need for our continued oversight of this industry in the context of a different, considerably more flexible regulatory framework than previously existed.

We conclude that applicants' allegations of error based on violation of Section 1708 are without merit. We also conclude that there is no merit to allegations that D.94-08-022 violates the "hearing" requirement of Sections 728 and 729. The extensive comment procedure employed to develop the record underlying D.94-08-022 provided parties with an opportunity to be heard; no

statutory hearing rights applicable to this Decision were violated.

Carriers' Allegations That D.94-08-022's EAS Order Is Vague And Ambiguous

In support of the allegations that D.94-08-022's discussion and order of EAS wholesale roamer re-rating is vague and ambiguous, carriers state that the Decision is unclear on whether the home/served carrier is to pass through the serving carrier's roamer rates to the reseller or to provide the reseller with a margin. In addition, carriers question D.94-08-022's adoption of the settlement agreement between McCaw/AT&T and CRA as a basis for sharing EAS revenue. They note that the McCaw/AT&T agreement does not address roamer re-rating and moreover, that it is inappropriate to apply that agreement to non-affiliated markets. They complain that if the McCaw/AT&T settlement agreement is imposed between non-affiliated markets, the home/served carrier would continually lose money on roaming which would not be offset by revenues collected by an affiliated serving carrier. This would thereby affect a result that would be confiscatory and discriminate against carriers that happen to have affiliates operating in the state.

We have carefully reviewed carriers' concerns and conclude that certain modifications to D.94-08-022 are warranted. With respect to whether carriers should pass through roamer rates or provide the reseller with a margin, we endorse our statement at page 87 of D. 94-08-022 that "On average, the goal should be that the cellular carrier is revenue neutral with respect to the [EAS] transaction." Consistent with that position, it is reasonable to modify D.94-08-022 to more clearly express our requirement that carriers provide a reseller margin only in those instances where a carrier re-rates and makes a profit. Otherwise, passing through the roamer rate is appropriate. We also agree with carriers that it is unnecessarily confusing to link the EAS procedures with the McCaw/AT&T settlement because

various provisions of that agreement may not apply outside the context of the McCaw/AT&T affiliation. While that settlement can serve as a model in circumstances where its terms reasonably apply, it is not the sine qua non of EAS revenue sharing. Accordingly, we shall delete the last paragraph of the text of D.94-08-022 at page 88 and we shall replace it with the following modification proposed by BACT:

> "We agree with CRA that the Commission should assure just and reasonable rates by enforcing the requirement that intercarrier roaming agreements be publicly filed. In order that resellers may share in any roaming revenues, the home/served carrier shall provide a margin to resellers in any instances where it is making a profit from re-rating roaming charges. In all other instances the home/served carrier shall bill the reseller precisely the amount billed it by the serving carrier." (BACT Application for Rehearing, page 17.)

In addition, to conform D.94-08-022's conclusions of law and ordering paragraphs with the text change noted above, we shall make these modifications:

1. In conclusion of law 10, delete the text after "...be publicly filed" so that it now reads: "It is reasonable that intercarrier agreements for EAS service be publicly filed".

2. Delete the existing text of conclusion of law 11 and replace it with the following: "It is reasonable that the home/served carrier provide a margin to resellers in any instances where it is making a profit from re-rating roaming charges in order that resellers may share in roaming revenues; in all other instances, it is reasonable that the home/served carrier bill the reseller precisely the amount billed it by the serving carrier."

3. Delete existing ordering paragraph 6 and replace it with the following: "In order that resellers may share in any roaming revenues, the home/served carrier shall provide a margin to resellers in any instances where it is making a profit from

re-rating roaming charges. In all other instances the home/served carrier shall bill the reseller precisely the amount billed it by the serving carrier".

Carriers' Allegations Of Error In D.94-08-022's Conclusions And Orders On Unbundling Of Wholesale Services And Rates And Interconnection Of Reseller Switches

Carriers allege that legal and factual errors apply to D.94-08-022's provisions related to carrier unbundling of wholesale services, rates, and the interconnection of a reseller switch. Many of these meritless allegations appear to be an opportunistic veil for extensive reargument of positions already expressed by carriers in the record underlying D.94-08-022. As previously noted, such reargruments will not be considered. Earlier, we discussed carriers' allegations that federal preemption invalidates our unbundling orders and explained our conclusion that such allegations are without merit. Now, we turn to allegations that the Decision is ambiguous and contradictory with respect to the unbundling/reseller switch issue. Our review of these allegations and the Decision persuade us that clarification is needed and that certain unbundling-related ordering paragraphs should be modified.

As a part of our requirement that carriers unbundle services, rates, and interconnect with a reseller switch, ordering paragraphs 3 and 4 of D.94-08-022 mandate carriers to develop wholesale rates to be charged to switched resellers which are different from the presently tariffed rates chargeable to switchless resellers. Ordering paragraphs 3 and 4 provide:

> "3. The Commission order shall direct such carrier to promptly file an advice letter with the Commission to amend its wholesale tariff reflecting a market-based unbundling of access charges billed to such switch-based resellers which have entered into interconnection agreements. "

> "4. Upon activation of the interconnection arrangement with the reseller, its billing shall be adjusted by applying a credit equal to the access charge on the reseller's bill." (D.94-08-022, ordering paragraphs 3 and 4, page 97.)

Applicants allege that the meaning of the above orders is at least ambiguous, if not contradicted by textual comments, findings of fact and/or conclusions of law. In ordering paragraph 3, the term "market-based unbundling" is the focus of applicants' concerns. In part, confusion about the meaning of this term appears to be caused by the attempts of some to interpret the Decision's "market-based unbundling" as though the wireless industry operates in the traditional context of the marketplace where unrestricted competition, supply and demand each play a pivotal role in the determination of the value/price of a product. Our use of the term "market-based unbundling" necessarily incorporates the realities of the wireless industry wherein competition is impacted by the existence of a legally sanctioned duopoly. Just as the genesis of "market-based rates" is distinctly different from that of rates predicated on a cost of service methodology, our characterization of the unbundling of cellular services and rates as market-based is intended, first and foremost, to signal that such unbundling is substantively different and distinguishable from cost-based rate unbundling.[13]

Our adopted unbundling program is market-based in that it is based upon rate levels which the carriers themselves establish based on market conditions. While these rate levels have been subject to approval by the Commission and are constrained by rate band pricing guidelines, they have not been based on, nor have they been subject to cost-of-service scrutiny.

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**13.** In D.93-05-069, we granted rehearing on the issues related to the cost-based unbundling of cellular carriers' wholesale tariffs which we had authorized in D.92-10-026, 46 CPUC2d 1, the Phase III decision in I.88-11-040.

In D.94-08-022, we considered the trade-offs involved in pursuing cost-of-service studies as a basis for unbundling. While such studies would provide more precise measures of the actual costs which carriers incur, including costs of invested capital, they would also be prohibitively time-consuming and expensive. By selecting a market-based approach to unbundling, we necessarily lose the cost-based pricing precision. However, market-based unbundling promotes the emergence of a competitive market and is consistent with our approach to this industry.

In ordering paragraph 4 of D.94-08-022, we sought to provide carriers with a formula for tariffing unbundled charges for switch-based resellers that would not rely on a cost-based analysis to define the various components of the bundled rate. The intent of that order was to make clear that the switched reseller should no longer pay for services that it would no longer need because the reseller's own interconnection switch would, in fact, replace functions previously provided by the carrier. Upon careful review of the Decision in the context of applicants' complaints and respondents' comments, we agree that the access charge formula for tariff unbundling referenced in ordering paragraphs 3 and 4 should be clarified and refined. However, as explained below, it would be prudent to defer that modification to a separate decision.

In D.94-11-029, we denied requests for stay and modification of D.94-08-022 and directed the assigned ALJ to solicit from the parties comments on implementation of rate unbundling ordered in D.94-08-022. We are advised that such comments were filed on or about November 30, 1994. We have decided that the clarification and refinement of the procedure for wholesale rate unbundling can best be accomplished in a separate decision which includes consideration of those additional comments filed on the subject. Accordingly, we shall delete the access charge formula, as expressed in ordering paragraphs 3 and 4 and defer further discussion of the formula for rate unbundling to a separate decision.

**THEREFORE**, for good cause appearing,

**IT IS HEREBY ORDERED** that:

1. Decision 94-08-022 is modified as follows:

a. At pages 83 and 84, delete the last paragraph on page 83 including the quotation from D.92-10-026 which ends on page 84.

b. At page 87, delete the following:

> "For the sake of clarity, however, we amend all CPCNs for cellular carriers to include a blanket authorization permitting EAS service anywhere within California."

c. At page 88, delete the last paragraph of the text preceding the Findings of Fact and replace it with the following:

> "We agree with CRA that the Commission should assure just and reasonable rates by enforcing the requirement that intercarrier roaming agreements be publicly filed. In order that resellers may share in any roaming revenues, the home/served carrier shall provide a margin to resellers in any instances where it is making a profit from re-rating roaming charges. In all other instances the home/served carrier shall bill the reseller precisely the amount billed it by the serving carrier."

d. At page 96, delete the text in conclusion of law 10 after "...be publicly filed" so that it now reads:

> "10. It is reasonable that intercarrier agreements for EAS service be publicly filed."

e. At page 96, delete conclusion of law 11 and replace it with the following:

> "11. It is reasonable that the home/served carrier provide a margin to resellers in any instances where it is making a profit from re-rating roaming charges in order that resellers may share in roaming revenues; in all other instances, it is reasonable that

the home/served carrier bill the reseller precisely the amount billed it by the serving carrier."

f. At page 96, add the following as conclusion of law 14:

"14. It is reasonable that resellers be responsible for direct costs associated with the interconnection of switches to the cellular MTSOs and to maintain their own connection to the LECs."

g. At pages 96 and 97, delete ordering paragraphs 1 through 7 and replace them with the following revision:

"1. Any switchless reseller that intends to own, control, operate, or manage its own cellular switch must submit to the cellular carrier a bona fide request for unbundled service, accompanied by an engineering plan describing how the provider would interconnect with the dominant carrier's mobile telephone switching office (MTSO). The plan would have to demonstrate the compatibility between the reseller's switch and the dominant carrier's MTSO."

"2. Upon completion of the requirements of ordering paragraph 1 above, the reseller shall:

(a) promptly notify the Commission by advice letter to the Branch Manager, Telecommunications, Commission Advisory and Compliance Division with a copy of said advice letter of intent to the cellular carrier designated for switch interconnection;

(b) upon installation and operation of the reseller switch, submit to the Commission, consistent with the procedures outlined in D.94-10-031, a new or updated Wireless Identification Registration indicating the reseller's status as a switch-based reseller.

"3. The facilities-based carrier which is the intended subject of the interconnection of a reseller switch shall unbundle their wholesale rates as directed in the

Commission's contemporaneous, separate decision devoted to wholesale rate unbundling."

"4. Carriers engaged in Extended Area Service (EAS) intercarrier agreements shall publicly file such agreements with the Commission."

"5. In order that resellers may share in any roaming revenues, the home/served carrier shall provide a margin to resellers in any instances where it is making a profit from re-rating roaming charges. In all other instances the home/served carrier shall bill the reseller precisely the amount billed it by the serving carrier."

"6. This investigation shall remain open for further study of outstanding issues not resolved by this interim order and adoption of a comprehensive framework for the mobile telephone service market.

2. Rehearing of Decision 94-08-022 as modified herein is denied.

This order is effective today.

Dated March 22, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners